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In the Supreme Court of the United States

OCTOBER TERM, 1957

NORTH WESTERN-HANNA FUEL CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is an appeal from the judgment of a three-judge district court dismissing a complaint which prayed that the court adjudge unlawful and set aside a "report, decision and order" of the Interstate Commerce Commission. The complaint attacked the Commission's determination, made in a Section 13 (4) proceeding, that the Minnesota intrastate rates on bituminous coal which were then in effect resulted in

unjust discrimination against interstate commerce, and that this discrimination should be removed by making the same increase in these intrastate rates which the Commission had authorized for interstate commerce some five years earlier.[1]

The report of the Commission, issued on April 23, 1957, stated that it would enter an order carrying its findings into effect unless notified, within 30 days after service of the report, that the Railroad and Warehouse Commission of the State of Minnesota ("Minnesota Commission") would permit the increase found to be necessary to remove unjust discrimination. 300 I. C. C. 201, 224. The Minnesota Commission, by its report and order of May 20, 1957, authorized this increase, but stated that while it previously had found the requested increase not justified, "it is reluctant to pursue the matter further in the Courts" (J. St. 52). Accordingly, no "order" was issued by ICC. However, the district court held that the ICC determination "had the same effect" as a formal order and that it was therefore subject to review under the holding of this Court in *Frozen Food Express* v. *United States,* 351 U. S. 40, 43–44 (J. St. 41).[2]

The present case grew out of a Commission proceeding, designated *Ex parte 175,* instituted in Janu-

[1] Diamond Match Company, which intervened as a plaintiff, attacked a like determination with respect to Minnesota intrastate rates on short logs or wood bolts (J. St. 37), but the appeal puts in issue only the Commission's determination of the proper and necessary intrastate rates on bituminous coal.

[2] We call attention to the facts bearing on the district court's jurisdiction under 28 U. S. C. 1336, but do not contend that the ICC determination is not reviewable.

ary 1951 by the country's major railroads seeking a general increase in interstate freight rates to provide revenues to offset sharply higher operating costs. In April 1952, the Commission authorized a 15% increase in basic freight rates, subject to specified exceptions and limitations.[3] For bituminous coal, the increase authorized was 12%, subject to a maximum of 40¢ per net ton, and for rail-water-rail transportation the 40¢ maximum was apportioned equally to the initial and final rail haul. 284 I. C. C. at 663. Since the coal which appellants handle at their docks at Duluth, Minnesota, moves by rail from eastern mines to Lake Erie ports and thence by water to Duluth, the maximum increase allowed on rail shipments from Duluth was 20¢ per net ton (J. St. 6–7).

The railroads operating in Minnesota applied to the Minnesota Commission for authority to extend to intrastate commerce the interstate rate increases authorized in the *Ex parte 175* proceeding, and the state commission, after some delay, granted the requested authority except for coal, forest products, sugar beets and certain other commodities. In the meantime, ICC, on the request of the affected railroads, instituted a Section 13 investigation of Minnesota intrastate rates. After the taking of evidence, the filing of the hearing examiner's proposed report, and argument before the full Commission, ICC issued a report in which it found, among other things, that

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[3] 284 I. C. C. 589, 662–666. This authorization followed two interim authorizations of smaller percentage increases (280 I. C. C. 179; 281 I. C. C. 557), and the authorization, originally granted for a limited period of time, was ultimately granted without time limitation (289 I. C. C. 395; 297 I. C. C. 17, 51).

Minnesota intrastate bituminous coal rates cause an undue and unjust discrimination in interstate commerce. *Minnesota Intrastate Freight Rates and Charges,* 300 I. C. C. 201, 202, 207–208, 223–224.

After the Minnesota Commission had authorized the rate increase which ICC had thus found to be requisite (*supra,* p. 2), appellants filed in the court below a complaint attacking the validity of the ICC determination, and the court enjoined, pending its determination of the issues raised by the complaint, application and enforcement of the ICC decision and the resulting order of the Minnesota Commission insofar as they related to bituminous coal. As a result, increased intrastate rates on bituminous coal did not go into effect until January 26, 1958 (J. St. 12), more than five and a half years after the corresponding increase in interstate rates.

The district court unanimously held that the ICC findings were adequate and not materially different from those held to be sufficient in *King* v. *United States,* 344 U. S. 254, and that the findings had the support of substantial evidence (J. St. 41–44).

ARGUMENT

I

The across-the-board rate increase which the railroads sought in the *Ex parte 175* proceeding was designed to meet the serious problem created by mounting costs of operation in the period of rising prices which followed World War II. Higher unit operating costs can be partly overcome by greater operating efficiency, usually entailing purchase of new equip-

ment or other capital expenditures. But, apart from such savings, additional revenue is needed to keep income and outgo in balance as operating costs go up. The railroads' ability to expand traffic volume, and hence revenue, is severely limited by competition from other modes of transportation. Higher traffic charges remain as an undesirable but apparently necessary means of securing needed additional revenue.

There is no question as to the statutory authority of the Interstate Commerce Commission to grant nationwide rate increases. The National Transportation Policy declared by Congress directs the Commission to administer the Interstate Commerce Act so as to develop a transportation system by rail, water and highway adequate to meet the needs of the commerce of the United States, the postal system and national defense. And Section 15a of the Act requires the Commission, in determining reasonable rates, to consider the need of the railroads for revenues sufficient to enable them to provide adequate and efficient service.

Since the railroads' entire operations, both interstate and intrastate, dictate their over-all revenue needs, intrastate commerce would be unduly favored as against interstate commerce if the latter had to bear the entire burden of rate increases granted to provide needed additional revenue. Section 13 (4) of the Act clothes the Commission with power to prevent this unjust discrimination by prescribing intrastate rates which will remove the discrimination.

This Court, in passing upon Section 13 (4) proceedings instituted in order to compel intrastate com-

merce to make its fair contribution to over-all railroad revenue needs, has consistently held that the statutory objective would be defeated if the section were interpreted as imposing requirements respecting proof and findings so onerous as to prevent prompt and effective administration and enforcement of the section.[4] If the Commission were required, in order to make a valid Section 13 (4) order, to segregate interstate and intrastate revenues and expenses, either railroad by railroad or for the involved railroads taken as a group (or if it were required to determine, with respect to the intrastate rates in dispute, the dollar contribution of higher rates respectively made by interstate and intrastate commerce, railroad by railroad or for the railroads as a group), the complexity of the proceeding would postpone corrective administrative action for many years and might, indeed, paralyze the Commission's administrative arm. Any existing unjust discrimination would continue throughout this time lag, and no retroactive order could require recoupment from intrastate commerce.

This case shows that even under the tests of a valid Section 13 (4) order which this Court has sanctioned, intrastate rates which the Commission has found to be unjustly discriminatory remained in effect for over five and a half years (*supra*, p. 4). In *Public Serv-*

[4] *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 588; *United States* v. *Louisiana*, 290 U. S. 70, 75–76, 78–79; *Florida* v. *United States*, 292 U. S. 1, 9; *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483; *King* v. *United States*, 344 U. S. 254, 275.

ice Commission of Utah v. *United States,* No. 15, this Term, the time lag was more than four years.[5]

II

Appellants' major contention appears to be that the Commission's order is not supported by adequate findings. They urge inadequacy in the findings as to the reasonableness of the interstate and the prescribed intrastate bituminous coal rates (J. St. 20–23) and inadequacy in what they term the "Revenue Findings" (J. St. 13–18).

The Commission found that interstate rates, increased as authorized in *Ex parte 175,* are "just and reasonable".[6] This is an explicit finding as to the reasonableness of the interstate rates on bituminous coal, since the Commission in *Ex parte 175* authorized a specified maximum increase in these rates. Likewise the Commission found that the prescribed intrastate bituminous coal rates will be reasonable. It found (J. St. 40): "The establishment of increased intrastate rates and charges as provided in finding 4[7] will not result in unreasonable rates or charges * * *". A

[5] From April 1952, when a 15% increase in interstate rates was authorized in the *Ex parte 175* proceeding, to May 1956, when the district court upheld the Commission's 13 (4) order (146 F. Supp. 803). See Gov. Br. in No. 15, this Term, fn. 5, p. 6.

[6] Finding 2 reads: "The amounts and percentages by which interstate freight rates and charges between points in Minnesota and points in other States were authorized to be increased in Ex Parte No. 175 are just and reasonable" (J. St. 39).

[7] Finding 4 refers to the Minnesota intrastate rates covered by finding 3, which rates include (J. St. 39) those on "bituminous coal."

finding that certain rates will not be unreasonable is a finding that they will be reasonable.

Appellants attack the Commission's so-called "Revenue" findings upon the ground that the Commission failed to make the following essential findings: "the total amount of revenues required by the railroad defendants to render adequate and efficient railway transportation service" (J. St. 13); the "amount of revenue" from intrastate bituminous coal shipments which would constitute a fair proportion of the total railway operating income of these railroads (*id.* 15); the "total amount of revenue" received by these railroads from "the entire movement of intrastate traffic in Minnesota" (*id.* 15–16); the results as to "each railroad" of its "entire intrastate operation in Minnesota" (*id.* 16), *i. e.*, "the entire intrastate traffic—freight and passenger—for each railroad" (*id.* 17).

The findings of the Commission in this case are of the same scope and character as those which this Court held to be adequate to sustain a Section 13 (4) order in *King* v. *United States,* 344 U. S. 254.[8] The Court there did not find the dollar amount of revenue which the railroads operating in Florida required in order to render adequate and efficient rail transportation service, or the dollar amount of revenue from Florida intrastate shipments which would constitute a

[8] The order which was reviewed prescribed not only a 5% increase for Florida intrastate rates generally but also larger increases for certain commodities on which there had been either no intrastate increase or an intrastate increase more than 5% less than the interstate increase. See 344 U. S. at 258, fn. 5. The order reviewed in *King* therefore prescribed, like the order in issue here, intrastate rates on particular commodities.

fair proportion of the Florida railroads' total operating income, or the dollar amount of revenue received by the Florida railroads from their total Florida intrastate operations, or the result of the entire Florida intrastate operations of each railroad operating in that state.[9] The Court, after referring to certain of the Commission's basic findings, said (344 U. S. at 275):

> More is not needed. It is not necessary, for general revenue purposes, to establish for each item in each freight rate a fully developed rate case.

The Court likewise quoted with approval (344 U. S. at 273) the following from *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 483–484:

> Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues.

On the day this Court decided the *King* case, it vacated a district court judgment which had set aside a Section 13 (4) order because the Commission had failed to find the amount of total revenue, or the amount of revenue from Montana intrastate traffic, required to enable the affected railroads to operate

[9] See the findings of the Commission set forth in fn. 13, 344 U. S. at 267–269.

efficiently.[10] Following remand of the cause for further proceedings in the light of the *King* decision (*Northern Pacific Ry. Co.* v. *Montana,* 344 U. S. 905), the district court held that since the Commission's findings were substantially the same as those approved in *King,* it "necessarily" followed that its findings were adequate to support its order. *Montana* v. *United States,* 117 F. Supp. 174, 177 (D. Mont.). Two other district court decisions, both subsequently affirmed by this Court, upheld the adequacy of Section 13 (4) findings upon the express basis that they were essentially the same as those held to be sufficient in *King. Tennessee* v. *United States,* 113 F. Supp. 634, 638 (M. D. Tenn.), affirmed, 346 U. S. 891; *North Carolina* v. *United States,* 128 F. Supp. 718, 722 (E. D. N. C.), affirmed, 350 U. S. 805.

It also seems clear that it is in recognition of the controlling effect of the *King* decision that other suits to set aside Section 13 (4) orders have not challenged the Commission's findings except on the basis of insufficient evidentiary support. See *Louisiana Public Service Comm.* v. *United States,* 125 F. Supp. 180 (E. D. La.), affirmed, 348 U. S. 885; *South Carolina* v. *United States,* 136 F. Supp. 897 (E. D. S. C.), affirmed, 351 U. S. 944; *Arkansas Public Service Comm.* v. *United States,* 147 F. Supp. 454 (E. D. Ark.); *Public Service Comm. of Utah* v. *United States,* No. 15, this Term. In short, the Commission, litigants and the courts have all viewed the *King* decision as definitive with respect to requisite findings

[10] *Montana* v. *United States,* 106 F. Supp. 778, 786 (D. Mont.).

in a Section 13 (4) proceeding growing out of a prior interstate revenue proceeding.

Appellants' challenge to the findings rests solely on *Chicago, Milwqukee, St. P. & P. R. Co.* v. *Illinois,* 355 U. S. 300. This was not the usual situation presented in a Section 13 (4) proceeding, that is, enforcement of the section in its relation to the objectives of Section 15a—fixing rates at levels which will enable the nation's railroads to furnish adequate and efficient transportation service. In the *Milwaukee* case, the Commission found that the intrastate rates applicable to the passenger commuter service which the railroad rendered in the Chicago area discriminated against interstate commerce because these rates did not cover the out-of-pocket costs of the service.

The Commission, in its Section 13 (4) report in that case, had recognized that the deficit from the Milwaukee Roads' total passenger operations "is relatively greater than from its suburban operations" (355 U. S. at 308, fn. 7). Discrimination is the different treatment of what is alike. On the facts involved in *Milwaukee,* the question was whether a revenue drain resulting from local commuter service was discriminatory against interstate commerce when the findings disclosed an equal or greater drain from total passenger operations, presumably predominantly interstate. If, therefore, the test is revenue drain from intrastate passenger service versus revenue drain from interstate passenger service, the Commission's findings showed no unjust discrimination against interstate commerce.

In *Milwaukee* the Court said that a "fair picture" of whether the intrastate traffic unduly discriminated against interstate traffic was not shown when the Commission limited its consideration to the revenue drain of the particular commuter service "in disregard of the revenue contributed by the [Milwaukee Road's] other intrastate services," and that in the circumstances of that case findings were required which "reflect the commuter service deficit in the totality of intrastate revenues". 355 U. S. at 308. But here, in contrast to the situation in *Milwaukee,* the contested intrastate rate increase was in effectuation of a rate increase the very premise of which was the "totality" of intrastate and interstate revenues. In addition, the directly comparable rates for transportation of bituminous coal between out-of-state points and Minnesota points currently bore the increase found to be requisite to achieve the statutory objectives. The essence of appellants' claim is that intrastate commerce should be immune from making any contribution to the needed increase in the totality of the affected railroads' revenues. Nothing said by this Court in *Milwaukee* suggests that the Court there overruled, or drastically limited, its holding in *King* in which, as previously stated, the findings were of the same scope and character as those made here.

III

Appellants also question the sufficiency of the evidence to support certain of the Commission's findings. Insofar as they raise the question of the adequacy of the evidence as to "railroad revenues" (J. St. 18–19),

their contention is not that the Commission's findings lack evidentiary support, but that the findings themselves are insufficient (a point already discussed, *supra*, pp. 7–12).

The finding that transportation conditions are no more favorable for intrastate commerce than for interstate commerce clearly is based on substantial evidence. Aside from the testimony underlying the finding that there is no difference from an operating standpoint between the two classes of traffic, there were findings, supported by evidence, that the percentage of all intrastate traffic transported in local trains was over three times the percentage of interstate traffic handled in such trains; that the wages of crewmen on local trains are substantially higher than on through trains; and that through trains operate between terminals at relatively high speeds with few intermediate stops, whereas local trains operate for shorter distances with stops at practically all local stations, resulting in proportionately higher switching and terminal costs.[11] In *New York* v. *United States*, 98 F. Supp. 855, 860 (N. D. N. Y.), affirmed, 342 U. S. 882, the court, in upholding a Section 13 (4) order, said that whether similarity in transportation conditions exists is "a question of fact", and that "as laymen we would hesitate to reverse a finding made by an expert body whose experience with the use and meaning of the terms lends added weight to its findings."

[11] 300 I. C. C. 201, 205–206; Tr. 44, 45, 47–48, 52, 67–68, 70, 72, 77, 78, 81, 86, 94; Exs. 13, 14.

Appellants urge inadequacy in the evidence underlying the finding that the carriers' revenues will be substantially increased by the increase in intrastate bituminous coal rates ordered by the Commission (J. St. 25–26). Appellants recognize that there was conflicting evidence on this issue, which necessarily involves forecast and prediction, and they therefore, in reality, are asking that this Court review the evidence for itself and substitute its judgment for that of the Commission. We submit that the court below was correct in stating that the Commission "is in a far better position than the Court to appraise and weigh the diverse opinions of witnesses for the railroads, the shippers, and the consumers in this regard" (J. St. 43).

Appellants also assert lack of substantial evidence to support the finding that the existing Minnesota intrastate bituminous rates were abnormally low, and they emphasize the absence of evidence as to the cost of moving bituminous coal in Minnesota intrastate commerce (J. St. 26). Appellants are thus asking the Court to repudiate its consistent rulings that general revenue proceedings under Section 15 (a) and related Section 13 (4) proceedings do not require a fully developed rate determination as to each rate involved, or evidence of costs and revenues segregated as between interstate and intrastate traffic. See *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 588; *United States* v. *Louisiana*, 290 U. S. 70, 75–76, 78–79; *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483–484; *King* v. *United States*, 344 U. S. 254, 275. The his-

tory of Minnesota intrastate bituminous coal rates and the rates for interstate transportation of bituminous coal between various destinations, which were before the Commission, afforded, we submit, sufficient foundation for its finding that the existing intrastate rates were abnormally low.

Finally, appellants urge error in the admission of two exhibits without requiring that the underlying data be made available and in restricting cross-examination with reference to this data (J. St. 27–30). But it is plain, as the court below held, that the errors in these evidentiary rulings, "if any, are not of sufficient gravity to justify" setting aside the Commission's order (J. St. 47).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

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